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Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action

Contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Note by the Secretary General

The Secretariat has the honour to transmit to the General Assembly the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, prepared pursuant to General Assembly resolution 72/157.

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Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Summary

In the present report, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance analyses the threat posed by nationalist populism to the fundamental human rights principles of non-discrimination and equality. The focus of the report is ascendant nationalist populist ideologies and strategies that pose a sobering threat to racial equality by fuelling discrimination, intolerance and the creation of institutions and structures that will have enduring legacies of racial exclusion. The report condemns nationalist populism that advances exclusionary or repressive practices and policies that harm individuals or groups on the basis of their race, ethnicity, national origin and religion, including in combination with gender, sexual orientation, disability status, migratory status or other related social categories. The objectives of the present report are: (a) to contribute a measure of analytical clarity to human rights debates regarding nationalist populism; (b) to map the most pressing of the dangers it poses from a racial equality perspective; and (c) to recall the international human rights equality and non-discrimination standards that apply in this context.

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I. Activities of the Special Rapporteur

1. The present report is submitted pursuant to General Assembly resolution 72/157.

A. Country visits

2. The Special Rapporteur expresses her gratitude to the Government of the United Kingdom of Great Britain and Northern Ireland for the cooperation extended to her during her official country visit from 30 April to 11 May 2018.

3. The Special Rapporteur would like to thank the Governments of Brazil, Morocco, the Netherlands, Poland and Qatar for accepting her country visit reports. She urges Member States to respond positively to her outstanding requests[1] and urges the Government of Colombia to reverse its decision to postpone consideration of her country visit request.

B. Other activities

4. The activities of the Special Rapporteur from November to March 2018 are reflected in her report to the Human Rights Council at its thirty-eighth session (A/HRC/38/52). On 6 and 7 June, the Special Rapporteur participated in side events and informal meetings held on the margins of the fifth round of negotiations on the Global Compact for Safe, Orderly and Regular Migration. On 25 and 26 June, the Rapporteur participated in an expert round table on the theme "Citizenship stripping as a security measure" held in The Hague.

5. The Special Rapporteur presented her first report to the Human Rights Council on 2 July 2018 and took part in two parallel events: one on the draft declaration on the promotion and full respect of human rights of people of African descent and another on the theme "Challenging contemporary forms of racism, including laws, policies, practices and narratives against migrants and others associated with migration". She also convened a civil society consultation entitled "Building an international human rights anti-racism agenda in the shadow of populist nationalism".

II. The threat of nationalist populism to racial equality

A. Introduction: nationalist populism

6. Popular sovereignty and a commitment to national prosperity are principles entirely consistent with international human rights standards and have played important roles in the global pursuit of racial equality. However, ascendant nationalist populist ideologies and strategies pose a sobering threat to racial equality by fuelling discrimination, intolerance and the creation of institutions and structures that will have enduring legacies of racial exclusion. The Special Rapporteur condemns nationalist populism that advances exclusionary or repressive practices and policies that harm individuals or groups on the basis of their race, ethnicity, national origin and religion, in combination with gender, sexual orientation, disability status, migratory status or other related social categories. As nationalist populism in different forms has increased in popularity, many concerned with international human rights have spoken out regarding its dangers. The objectives of the present report are: (a) to contribute a measure of analytical clarity to human rights debates regarding

[1] Listed in A/HRC/38/52, para. 2.

nationalist populism; (b) to map the most pressing of the dangers it poses from a racial equality perspective; and (c) to recall the international human rights equality and non-discrimination standards that apply in this context.

7. There are different perspectives among political scientists regarding how best to conceptualize and define populism. Four leading approaches to defining populism are to treat it as an ideology, a form of discourse or rhetoric, a political strategy or a type of political logic.[2] The present report implicitly considers populism in all four modes.

8. Although the meaning of populism remains contested, there are a number of defining features that enjoy relative consensus in academic literature and capture the specific political phenomena at stake in the present analysis. Generally speaking, the ideology of populism focuses on societal cleavage between unaccountable or corrupt elites and "the people", a general populace viewed as exploited or neglected by those power-holding elites. In its most dangerous variants, populism deploys a monolithic, exclusionary vision of who qualifies as "the people." Those groups and individuals depicted as excluded from forming a part of "the people" then also become targets of populist antagonism, even if those groups and individuals have no elite status.[3] This has led one scholar to argue that populism is "an exclusionary form of identity politics".[4] Critical to a human rights understanding of dangerous populist mobilizations, then, is that they tend to be not just anti-elitist, but anti-pluralist, as discussed in more detail below.

9. There is a fair amount of consensus among populism scholars that populism is ideologically "thin-centred", and that its limited ideological content typically means that populism must be combined with some other ideology before it can be an effective political force.[5] As a result, populist movements and political parties occupy the broad spectrum of political positions, such that populist movements have existed in centre, left-wing and right-wing manifestations. Across Europe and in the United States of America, for example, contemporary populist fervour has largely reflected right-wing commitments, whereas in Asia and Latin America, centre and left-wing populist movements have had more pronounced successes.

10. Although populism on the right and the left commonly adopts anti-establishment positions, often calling for the dismantling of various liberal democratic institutions viewed as disadvantageous to the group identified as "the people", political scientists have found that right-wing populism tends to be inward-looking and primarily nationalist in its orientation, whereas left-wing populism has traditionally been oriented towards internationalism.[6] One reason for this is that "left-wing populist parties define the people on a class basis, referring mostly to the poor. In contrast, right-wing populist parties define the people on a cultural, nativist base".[7] Research has also found that, unlike left-wing populism, right-wing populism is notably hostile to minority rights.[8] This is not to say that left-wing populism cannot threaten human

[2] Ibid., chap. 2.

[3] Hanspeter Kriesi and Takis S. Pappas, "Populism in Europe during crisis: an introduction", in Kriesi and Pappas, eds., *European Populism in the Shadow of the Great Recession* (Colchester, United Kingdom, ECPR Press, 2015), p. 5.

[4] Jan-Werner Müller, *What is Populism?* (Philadelphia, University of Pennsylvania Press, 2016), p. 3.

[5] Cas Mudde and Cristóbal Rovira Kaltwasser, Populism: *A Very Short Introduction* (New York, Oxford University Press, 2017).

[6] Ruth Wodak, *The Politics of Fear: What Right-Wing Populist Discourses Mean* (London, Sage, 2015), p. 148.

[7] Robert A. Huber and Christian H. Schimpf, "On the distinct effects of left-wing and right-wing populism on democratic quality", *Politics and Governance*, vol. 5, No. 4 (2017), p. 148.

[8] Ibid., p. 151.

rights and racial equality. Although history, for example in Latin America, provides examples of left-wing populism that have improved the circumstances of marginalized groups through social reform, there are contemporary examples of left-wing populist governance presiding over extreme political repression and other human rights violations. This is partly because, even though left-wing populist parties generally do not target minorities per se, they can often reject political competition and claim the sole right to rule.[9] It is thus important to underscore that populism in its dangerous forms on both the left and the right exhibits anti-pluralist commitments.[10]

11. The present report centres on nationalist populism to highlight the specific threats to racial equality that arise when these two orientations are combined. Nationalist populism — especially when it is adopted by ethno-nationalists — tends to limit "the people" to a particular racial, ethnic or religious group understood to be the only legitimate national group. Right-wing populists champion this ethno-nationalist conceptualization of "the people" using the increasingly multicultural nature of societies as evidence of an imminent threat against the survival and preservation of the nation. Right-wing nationalist populists regularly take the additional step of arguing that those identified as "the people" are long-suffering victims of multicultural society, and that multiculturalism itself is a driver of socioeconomic decline for "the people". The strategy, then, is not just to target elites, but also to target multiculturalism and members of minority races, ethnicities and religions as all part of the problem. Racial, ethnic and religious minorities are relegated to the status of illegitimate interlopers whose interests are characterized as oppositional to those of the group exclusively designated as constituting "the people". Thus, when nationalist populists appropriate the language of democratic legitimacy and representation of "the people", this language masks exclusionary and typically racialized conceptions of the nation that are at odds with liberal conceptions of democracy.

12. Where ethno-nationalist populism is a feature of government, those in power can begin to oversee the rewriting of national history — including to deny the Holocaust, for example — in order to reaffirm a racially, religiously or ethnically specified conception of who "the people" are.[11] And even if nationalist populists do not win seats in government, their participation in public discourse and the electoral process can nonetheless result in a shift in the mainstream political discourse to embrace previously marginal, exclusionary positions.[12] Some of these discourses include a commitment to ethno-nationalist versions of national history that suppress the vital contributions that racial, ethnic and religious minorities have made to build the respective nations. Ethno-nationalists can seek to write minorities out of the history of the nation. The most recent report of the Special Rapporteur to the Human Rights Council includes a more detailed analysis of ethno-nationalism as a threat to racial equality, and of the interaction between neo-Nazi and other extremist ideologies with populist mobilizations.[13]

13. Nationalist populism often successfully advances heteronormative, patriarchal visions of the nation, and a version of "traditional values" that leads to serious violations against marginalized social groups (including women, gender and sexual minorities, and persons with disabilities), especially when those who are socially marginalized are also racial, ethnic or religious minorities. It shores up the dominance

[9] Ibid., p. 148.

[10] Müller, *What is Populism?*, p. 3 ("In addition to being anti-elitist, populists are always anti-pluralist").

[11] A Croatian submission highlighted government-sanctioned historical revisionism along these lines.

[12] See Wodak, *The Politics of Fear*, p. 184 (noting the normalization of right-wing populist policies that push the entire political spectrum to the right).

[13] See A/HRC/38/52.

of men and enforces rigid gender roles, denying women and others full agency, especially over their reproductive and sexual rights. Non-conforming women become a target for populist nationalists, who in some cases carry out misogynist online and other attacks against these women. Nationalist populist fervour in some parts of the world has also advanced a backlash against equal rights for lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) persons in ways that deny their inherent human dignity and entitlement to full enjoyment of human rights. A comprehensive racial equality analysis of nationalist populism must keep sight of the ways that multiple intersecting social identities transform the experience of racial discrimination in this context, as they do in others. It must also keep sight of the ways that States use patriarchal, gender-discriminatory laws to achieve racial, ethnic and religious exclusion, as canvassed in this mandate's most recent report to the Human Rights Council.[14]

14. There is reason to believe that new forms of media have aided or amplified the influence of nationalist populism, and leaders of these movements have been especially successful at exploiting new media technology (including social media) for their benefit. Research has highlighted, for example, the role of increasingly diversified media that focus more on sensationalism, which is a communication style favoured by populists.[15] The provocative nature of nationalist populist leaders is appealing in media industries structured around sensationalism and the reporting of scandalous news, in order to increase readership. Even as nationalist populists have profited from media, however, they have been characteristically repressive of free and independent media. Media outlets that are critical of populist leaders are often described by populists as agents of the corrupt "elite" or outsiders, accused of producing "fake news", and may even face the risk of being prevented from operating, as discussed below.

15. Rightly, the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, has taken a bold stand, publicly denouncing a number of populist leaders who have been willing to stoke racism, xenophobia and related intolerance with little regard for the human rights of many within the borders of their countries: Norbert Hofer (Austria), Miloš Zeman (Czechia), Marine Le Pen (France), Viktor Orbán (Hungary), Geert Wilders (Netherlands), Robert Fico (Slovakia), Nigel Farage (United Kingdom) and Donald Trump (United States), among others.[16] The High Commissioner's response to the Prime Minister of Hungary in particular illustrates the false claims that often lie at the heart of nationalist populist demagoguery. In February 2018, Prime Minister Orbán made a statement before a group of city councils in which he said that "we do not want our colour ... to be mixed in with others".[17] The High Commissioner noted that the latest census in Hungary, which has a total population of just under 10 million,[18] indicates that 1,064 men and 260 women from Africa, a total of 10,559 people from all of Asia, and too few from the Middle East to even be counted live in Hungary. Yet Prime Minister Orbán has managed to portray Muslims and Africans as an existential menace to Hungarian culture. Denouncing the racist and xenophobic lies of populist nationalists remains an urgent priority.

[14] Ibid.

[15] Benjamin Moffit, *The Global Rise of Populism: Performance, Political Style and Representation* (Stanford, California, Stanford University Press, 2016).

[16] "Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, "Zeid warns against populists and demagogues in Europe and the United States", statement to the Peace, Justice and Security Foundation gala, The Hague, 5 September 2016.

[17] OHCHR, "Hungary: opinion editorial by United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein", available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22765.

[18] See www.ksh.hu/nepszamlalas/?lang=en.

B. Global and regional trends: a racial equality analysis

16. This section aggregates different types of racially discriminatory human rights violations associated with nationalist populism around the world. Examples are drawn from different sources, including submissions received by the Special Rapporteur in response to her call for input for the present report.[19] Contemporary trends include individualized and structural threats, and require an intersectional analysis to account for the ways in which other social categories such as gender, sexual orientation and disability status can compound and alter the experience of discrimination and intolerance rooted in nationalist populism.

Racist and xenophobic violence, hate crimes and hate speech

17. Perhaps the most visible impact that resurgent nationalist populism has had on racial equality has been to escalate incidents of racist and xenophobic violence, crimes and speech all over the world. It has also aided the spread and mainstreaming of messages of intolerance that had typically been confined to marginal, extremist platforms.

18. With respect to Europe, the European Union Agency for Fundamental Rights, in a 2016 report on hate crimes, highlighted the pervasive nature of violence, harassment, threats and xenophobic speech targeting asylum seekers and migrants, as well as persons with visible ethnic backgrounds, and Muslims (especially women). Human rights activists, pro-refugee politicians as well as journalists reporting on refugee issues were also targets. Perpetrators of hate incidents and crimes included State authorities, private companies and individuals and vigilante groups.[20] These incidents and crimes have varied in intensity and sometimes resulted in killings. For example, the same report noted that in October 2015, an Afghan asylum seeker had been shot dead by Bulgarian police after crossing the Bulgarian-Turkish border. In Fermo, Italy, a Nigerian asylum seeker, reacting to racist insults addressed at his wife, was beaten to death with an iron pole. In 2018, three migrants were shot while attempting to remove iron materials from an abandoned factory in Calabria. One of them, a young Malian man who was a union-worker activist, died.[21] Attacks of a violent nature against asylum accommodation and reception centres were reported in all European Union member States, but very few of them systematically record incidents and publish public reports.[22]

19. Nationalist populist political parties and even elected officials have been among the worst offenders where racist and xenophobic speech is concerned. The European Commission against Racism and Intolerance, in its general policy recommendation No. 15 on combating hate speech, adopted on 8 December 2015, decried this trend, noting that the cultivation and dissemination of racist, xenophobic and neo-Nazi ideas and hate speech has not been limited to extremist organizations.[23] Mainstream parties and leaders, including parliamentarians, have participated in these activities and continue to do so. In a 2014 report, the European Network against Racism suggested that during the 2014 electoral campaign for the European Parliament, 42 hate speech

[19] See www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/ImpactOfNationalistPopulism.aspx.

[20] European Union Agency for Fundamental Rights, *Current Migration Situation in the EU: Hate Crime* (Vienna, 2016).

[21] European Union Agency for Fundamental Rights, "Periodic data collection on the migration situation in the EU", July 2018, lists a number of violent incidents against asylum seekers and refugee reception facilities.

[22] European Union Agency for Fundamental Rights, *Current Migration Situation in the EU*.

[23] European Commission against Racism and Intolerance, general policy recommendation No. 15 (2015) on combating hate speech, para. 24.

incidents were reported.[24] Out of the persons who proffered hate speech, five became members of the European Parliament. Out of 42 reported hate speech incidents against minorities, the most frequent form (27 reported incidents) involved implicit incitement to hatred, prejudice or discrimination. The Network estimates that more than 10 per cent of the members of the European Parliament are from parties propagating racist and/or xenophobic ideas. Candidates and other politicians have most frequently attacked migrants, foreigners and asylum seekers, sexually diverse populations, Muslims and Roma people.

20. In Australia and the United States and across Europe, politicians in government have used print and social media unapologetically to make racist and xenophobic statements that have included promises to adopt policies targeting specific racial, ethnic and religious groups, even when such policies would violate existing laws. In July 2018, the Minister of the Interior of Italy defied a decision by the Supreme Court of Cassation of Italy[25] in which the Court ruled that telling non-European Union foreigners to leave the country qualifies as racial discrimination. He responded to the ruling through a Facebook post, writing "Go home, go home, go home!" above a picture of a group of black African men.[26] In this climate of public intolerance, Italy has seen a stark increase in the number of seemingly hate-motivated violent attacks (including killings) since the beginning of 2018.[27]

21. In the United States, President Donald Trump's xenophobic nationalist populist rhetoric has consistently stigmatized and vilified migrants, refugees and racial and ethnic minorities. According to the latest official United States hate crime statistics,[28] published for 2016, law enforcement agencies reported 6,121 hate crimes, of which 57.5 per cent were motivated by race, ethnicity or ancestry.[29] These numbers represent an increase since 2015.

22. The report of this mandate on Nazism, neo-Nazism and related intolerance, presented to the General Assembly at its seventy-second session, focuses on racist expression online, which is where many incidents of racist and xenophobic speech also occur. For example, in January 2018 the World Jewish Congress recorded that anti-Semitic posts on social media, including Holocaust denialism, had risen by close to 30 per cent compared with the same period in 2016.[30]

23. In parts of Africa, nationalist populist hate speech has often crystallized during electoral campaigns. Incitement to violence or hatred, including by politicians, community leaders or journalists, in the most extreme cases has resulted in gross human rights violations. On the continent, politicians have often used nationalist populist rhetoric to capitalize on legitimate long-standing, colonial-era grievances over land rights and other issues to galvanize illegitimate racial intolerance. The recent history of Zimbabwe offers an example.[31] In 2017, the Kenya National

[24] European Network against Racism, "Reporting hate speech in the #EP2014 campaign".

[25] Elaine Allaby, "Telling migrants to 'go home' is racism, rules Italy's top court", *The Local*, 13 July 2018.

[26] Ibid.

[27] Lunaria, "Il ritorno della 'razza'", Focus N.4/2018, June 2018.

[28] Data on the number of incidents, offences, victims and offenders in reported crimes that were motivated in whole or in part by a bias against the victim's perceived race, religion, national origin or disability.

[29] United States, Federal Bureau of Investigation, 2016 Hate Crime Statistics database, available at https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses.

[30] See A/HRC/38/53, para. 19.

[31] E. Tendayi Achiume, "The SADC Tribunal: sociopolitical dissonance and the authority of international courts", in Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen, eds., *How Context Shapes the Authority of International Courts* (New York, Oxford University Press, 2017), p. 17.

Commission on Human Rights, in its alternative report to the Committee on the Elimination of Racial Discrimination,[32] noted that "the use of hate speech along ethnic lines and derogatory remarks about other tribes, races and communities has become the hallmark for Kenya's political rallies during the run-up to the [2017] elections" and that incitement to violence contributed significantly to electoral violence in that country's 2007 and 2012/13 electoral cycles.[33] In South Africa, political leaders have engaged in nationalist populist xenophobic rhetoric, sometimes indirectly legitimizing the spread of xenophobic violence. One political leader in that country was found guilty of hate speech and incitement to violence against white South Africans.[34] In India, the election of the Hindu nationalist Bharatiya Janata Party (BJP) has been linked to incidents of violence against members of Dalit, Muslim, tribal and Christian communities. Reports document the use of inflammatory remarks by BJP leaders against minority groups, and the rise of vigilantism targeting Muslims and Dalits.[35]

24. In its most extreme form, the implementation of majority will with no regard for minority rights results in genocide and ethnic cleansing. In Myanmar, for example, nationalist populist rhetoric capitalizing on decades of prejudice and State-sponsored discrimination against Rohingya Muslims has led to a campaign of extreme violence against the minority, amounting to ethnic cleansing and crimes against humanity.[36] In 2016, the Office of the United Nations High Commissioner for Human Rights (OHCHR) reported that since the 1990s, "extremist or ultra-nationalist Buddhist organizations have actively promoted messages of hatred and intolerance against Muslims and other religious minorities. Groups including the Organization for the Protection of Race and Religion (known as MaBaTha) spread messages based on fear and hatred, compare Muslims to animals, use derogatory language and present Muslims as a threat to the 'Buddhist State'".[37] OHCHR also found that ultra-nationalist Buddhist organizations also targeted moderate Buddhists, interfaith activists, women's rights activists and the Special Rapporteur on the situation of human rights in Myanmar.[38] In March 2018, the Special Adviser on the Prevention of Genocide unequivocally confirmed that "international crimes were committed in Myanmar. Rohingya Muslims have been killed, tortured, raped, burned alive and humiliated, solely because of who they are".[39] The independent international fact-finding mission on Myanmar noted in March 2018 that it had no information on any attempts by the Government to combat hate speech and other violations to protect the fundamental rights of Rohingya, including the right to life.[40]

Institutionalization of structural and other forms of exclusion

25. In the light of its exclusionary anti-pluralism, nationalist populist governance can result in systemic political, social and other forms of exclusion of groups or

[32] Submission to the Committee on the Elimination of Racial Discrimination.

[33] Ibid.

[34] See South Africa, Equality Court, *Afri-Forum and Another v. Malema and Others*, case No. 20968/2010, judgment of 12 September 2011; see also OHCHR, "Report from OHCHR fact-finding mission to Kenya, 6–28 February 2008", available at www.ohchr.org/Documents/Press/OHCHRKenyareport.pdf.

[35] Human Rights Watch, submission to the Human Rights Council universal periodic review of India, 2016.

[36] See A/HRC/32/18.

[37] Ibid., para. 22.

[38] Ibid.

[39] Adama Dieng, Special Adviser to the Secretary-General on the Prevention of Genocide, statement on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar, 12 March 2018.

[40] Marzuki Darusman, Chair of the Independent International Fact-Finding Mission on Myanmar, statement to the Human Rights Council at its thirty-seventh session, Geneva, March 2018.

individuals labelled as falling outside of the group designated as "the people". This structural exclusion is achieved through discriminatory laws and policies that pursue, among other things: voter suppression aimed at racial, ethnic and other minorities; constitutional and legislative amendments to exclude certain groups from political life on racial, ethnic, religious or other grounds; and restriction of access to public goods and services and even to equality before the law on racial, ethnic, religious or other grounds.

26. Once they are in government, nationalist populists often deploy a range of tactics to disenfranchise groups portrayed as outsiders, including racial and ethnic minorities. These might include, for example, seemingly race-neutral measures imposing specific photo identification and other requirements that disproportionately exclude marginalized groups from voting.

27. An example of more blatant institutionalized ethnic and religious exclusion can be found in the preamble to the Hungarian Constitution of 2011, which portrays Hungary as "a nation of Christians, ethnically distinct from minorities living alongside the 'real' Hungarians".[41] Further advancing racial and ethnic exclusion, in June 2018 the Hungarian Parliament adopted the Seventh Amendment to the Fundamental Law and a legislative package called "Stop Soros", which amends the Aliens, Asylum and Police Acts as well as the Criminal Code. The new laws prohibit the settlement of non-European immigrants in Hungary. They restrict the right to asylum and prohibit entry and stay in designated areas of the country. Furthermore, they criminalize providing support to irregular migrants.[42] Civil society submissions have also highlighted the rise in racially discriminatory immigration laws and policies in the country, driven by nationalist populist ideology and diminishing the rights of non-nationals to employment, education and health care.

28. Nationalist populist parties in other places have implemented administrative and other rules leading to the exclusion of minority groups from official citizen registries on the basis of claims that they are irregular migrants, notwithstanding evidence showing that they are entitled to citizenship. This in turn has led to statelessness, disenfranchisement and increased vulnerability to discrimination, including the denial of basic rights and access to public services such as health and education. In May 2018, the Special Rapporteur addressed a letter to the Government of India concerning the updating of the National Register of Citizens, a process governed by local authorities in the state of Assam. The letter drew attention to the heightened concerns of the Bengali Muslim minority, who have historically been portrayed as foreigners despite having lived in India for generations, even preceding the colonial era. Since 1997, the Election Commission of India has arbitrarily identified a large number of Bengali people as so-called "doubtful or disputed voters", resulting in their further disenfranchisement and the loss of entitlements to social protection as Indian citizens.[43] While many have affirmed that the updating process is generally committed to retaining Indian citizens on the National Register of Citizens, concerned parties fear that local authorities in Assam, who are deemed to be particularly hostile towards Muslims and people of Bengali descent, may manipulate the verification system in an attempt to exclude many genuine Indian citizens from the updated Register.[44]

[41] Cristóbal Rovira Kaltwasser and others, eds., *The Oxford Handbook of Populism* (New York, Oxford University Press, 2017), p. 599.

[42] European Union Agency for Fundamental Rights, "Periodic data collection".

[43] Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, communication on legislation and policy, other letter IND 13/2018, 11 June 2018.

[44] Ibid.

29. In her most recent report to the Human Rights Council, the Special Rapporteur denounced the growing number of States that have threatened to adopt, or even adopted, blanket bans against refugees and other non-nationals of particular religious affiliation or national origin, most commonly Muslims and residents of Muslim-majority countries. In the United States, such bans have been implemented by the executive orders of a President who has publicly made racist, xenophobic and Islamophobic statements against non-nationals as well as United States citizens belonging to racial and ethnic minorities. President Trump's nationalist populist agenda has also included policies separating thousands of children from their asylum-seeking families at the southern border of the United States, which have rightly drawn global condemnation.[45]

30. Also in her most recent report to the Human Rights Council, the Special Rapporteur highlighted the racialized impact that nationalist populist mobilizations can have on counter-terrorism policy.[46] Populists in Europe and beyond have capitalized on the increased number of terrorist attacks in the past two years to garner support for policy proposals that are blatantly discriminatory and legitimize profiling in security-related surveillance that targets mainly Muslim communities. In her report, she explains why such policies violate equality and non-discrimination principles.

Shrinking of liberal democratic and civic space

31. Empirical research has shown that "populist parties in government and opposition are negatively associated with mutual constraints [including separation of powers] compared to instances where no populist parties are in government or opposition".[47] Evidence shows that, generally, nationalist populist Governments have tended to exacerbate corruption and to weaken the mechanisms of checks and balances that are intended to prevent the illegitimate usurpation of power by any one branch of government or political party. They have also tended to suppress civil society, all in the name of the will of "the people".

32. In Asia, as in other regions, nationalist populist leaders have cracked down on political dissent, vilifying anyone with different political views as an enemy of the people and thus to be disposed of. Populist traditional values and law and order rhetoric, for example, in the Philippines, have sustained brutal extrajudicial killings of so-called drug users.[48] Government attacks in that country have also targeted those committed to defending the rule of law. For example, the populist leader of the Philippines threatened and insulted a Chief Justice of the Supreme Court after she had expressed concerns regarding threats to the rule of law. The Chief Justice was voted off the Court two days later, prompting the Special Rapporteur on the independence of judges and lawyers to issue a statement of concern.[49] The erosion of judicial institutions that otherwise function as central to the defence of racial, ethnic, sexual, gender and other minorities makes those groups even more vulnerable to discriminatory treatment.

33. Nationalist populists in Latin America have presided over the systemic oppression and repression of political opponents, including the use of deadly violence. The Inter-American Commission on Human Rights has documented this

[45] OHCHR, "United Nations experts to United States: 'Release migrant children from detention and stop using them to deter irregular migration'", 22 June 2018.

[46] See A/HRC/38/52.

[47] Huber and Schimpf, "On the distinct effects of left-wing and right-wing populism on democratic quality", p. 151.

[48] Rainer Eizenberger and Wolfram Schaffer, "The political economy of new authoritarianism in Southeast Asia", *Austrian Journal of South-East Asian Studies*, vol. 11, No. 1 (2018).

[49] OHCHR, "*Judicial independence in Philippines is under threat*, says United Nations human rights expert", 1 June 2018.

political repression, which has included the criminalization of political speech in the Bolivarian Republic of Venezuela.[50] Human rights defenders, especially those representing racially subordinated groups, also face the risk of death and assassination in many countries where populist law and order narratives are used to justify the criminalization and militarization of socioeconomically marginalized communities. The Commission has documented the acquiescence and, in some cases, the outright support of nationalist populist parties in control of the State regarding violence against human rights defenders, including those representing Afrodescendants and indigenous peoples. This has been the case in Honduras.[51]

34. Nationalist populism has also seriously threatened civil society organizations, including human rights organizations providing support to minority groups, migrants and refugees and other marginalized groups. In May 2018, the Committee on the Elimination of Racial Discrimination expressed its urgent concern at the decision of the State Prosecutor of the Philippines to file a court petition that would have criminalized 600 members of civil society, many of whom were indigenous leaders and human rights defenders.[52] The Special Rapporteur on the rights of indigenous peoples, a former member of the Permanent Forum on Indigenous Issues and a former member of the Expert Mechanism on the Rights of Indigenous Peoples were all among those listed.

35. The Special Rapporteur on the situation of human rights defenders, in his 2018 report to the Human Rights Council, denounced unprecedented restrictions, including denunciation in public discourse, intimidation and criminalization of individuals, groups and communities defending the rights of people on the move. Those who have conducted search and rescue operations at sea have been arrested, had their boats seized and been accused of smuggling.[53]

36. In Italy, after the anti-establishment Five Star Movement and the Northern League formed a coalition Government, the new Minister of the Interior restricted the movement of a civil society organization conducting search and rescue of irregular migrants' boats at sea, and threatened them with potential legal action. Rescue boats have also been prevented from docking at the nearest port of safety, as was the case with the *Aquarius* in Italy in June 2018.[54] The Office of the United Nations High Commissioner for Refugees (UNHCR) has expressed concern about the impact of a more limited search and rescue capacity if boats are discouraged from responding to distress calls out of fear of being denied permission to disembark. UNHCR reported that in June 2018 alone, 1 person had died for every 7 who had crossed the Central Mediterranean, compared with 1 in 19 in the first half of 2018 and 1 in 38 in the first half of 2017.[55]

37. In June 2018, Hungary criminalized individuals and groups deemed to be supporting asylum seekers, refugees and undocumented migrants. The law in question

[50] Inter-American Commission on Human Rights, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela* (2017).

[51] Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras* (2015), paras. 57, 64, 85–89 and 92.

[52] OHCHR, "Philippines: United Nations racial discrimination experts voice concern at 'terrorist' list", 14 May 2018; see also OHCHR, "Philippines warned over 'massive' impact of military operations on Mindanao indigenous peoples", 27 December 2017.

[53] See A/HRC/37/51, para. 1.

[54] Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, statement to the Human Rights Council at its thirty-eighth session, Geneva, 20 June 2018.

[55] Office of the United Nations High Commissioner for Refugees (UNHCR), "As Mediterranean Sea arrivals decline and death rates rise, UNHCR calls for strengthening of search and rescue", briefing note, 6 July 2018.

makes it a criminal offence for any lawyer, adviser, volunteer or legal resident family member to provide support to anyone seeking to lodge an asylum claim or obtain a residence permit, or provide other legal or humanitarian assistance, including distributing information on migration-related matters, providing advice to migrants and refugees, and conducting human rights monitoring at borders.[56] In June 2018, the Hungarian authorities announced that they would also introduce a 25 per cent tax on funding for non-governmental organizations that "support immigration".[57]

38. An Eastern European submission raised concerns about populist government censorship and control over media, as well as about smear campaigns and public intimidation targeting human rights defenders. In the Philippines, independent media have been under attack as well. In January 2018, a group of United Nations Special Rapporteurs issued a statement of urgent concern at the revocation of the media licence of a Filipino outlet that had produced critical coverage of President Rodrigo Duterte and his deadly "war on drugs".[58] Affiliates of the media outlet had received harsh criticism from the President and his supporters, including threats of violence.

39. A recent United Nations report documents the use of an emergency decree to crack down on independent media sources in Turkey, including when such sources have been tied to efforts to promote dialogue on issues relating to Kurds.[59] According to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "The crackdown affects media outlets affiliated with the Gülen movement and journalists working or having previously worked for such outlets, journalists perceived to have connections to the Gülen movement, independent, oppositional or minority media outlets and journalists accused of affiliation with the Gülen movement".[60] He has also warned of the more general contraction in civic and political space in Turkey.[61]

Patriarchy, heteronormativity and "traditional values"

40. As indicated above, nationalist populist rhetoric and policy regularly advocates a heteronormative, patriarchal vision of the nation and a return to "traditional values". "Traditional values" are often patriarchal, heteronormative practices and norms that severely constrain the autonomy of women. Such values also constrain the autonomy of non-conforming gender and sexual minorities, who, because they are cast as "other", do not enjoy the status of "the people" as legitimate beneficiaries of the nation. Across Europe, in countries that have experienced the rise of right-wing nationalist populists, the number of hate crimes and incidents against LGBTQI individuals has risen.[62] With regard to Asia, researchers have argued that, notwithstanding the diversity in populist ideology across the continent, the notion of "Asian values" has been used by authoritarian populist leaders to justify attacks against those deemed not to conform to such values.[63]

[56] Reference to the "Stop Soros" law package, original publication available at http://njt.hu/cgi_bin/njt_doc.cgi?docid=209036.356012. http://europa.eu/rapid/press-release_IP-171982_en.htm.

[57] OHCHR, "New Hungary legislation 'shameful and blatantly xenophobic' — Zeid", 21 June 2018.

[58] OHCHR, "United Nations experts express serious alarm at effort to shut down independent media outlet in the Philippines", 25 January 2018.

[59] See A/HRC/35/22/Add.3, para. 36.

[60] Ibid., para. 39.

[61] Ibid., para. 58.

[62] For example, this was the case in the United States in 2016, when, according to the Federal Bureau of Investigation, 6,121 hate crime incidents were reported, representing an increase of 5 per cent compared with 2015. Of those 6,121 incidents, 1,076 were based on sexual orientation bias and 124 on gender identity bias, reflecting increases of 2 per cent and 9 per cent, respectively. See Federal Bureau of Investigation, 2016 Hate Crime Statistics database.

[63] Eizenberger and Schaffer, "The political economy of new authoritarianism in Southeast Asia".

41. Among ethno-nationalist populists, rhetoric about preserving the "pure, authentic people" is often closely linked to sexual and reproductive rights. Feminism, which at its core is about realizing women's right to equality, is also portrayed as antithetical to the nation. For example, a 2010 presidential candidate for the Freedom Party of Austria supported by the far right publicly criticized feminism and efforts to promote gender mainstreaming, and argued that the legal definition of marriage presumed the intention to produce and raise children.[64] In the United States, abortion and even contraception have been portrayed as a threat to traditional, white patriarchal conceptions of the family. Female candidates affiliated with the Tea Party movement, among them Michele Bachmann and Sarah Palin, went so far as to argue that abortion should be outlawed, even in cases of rape.[65] Also in the United States, the nationalist populist President has promoted misogyny by repeatedly making statements publicly demeaning women. Beyond attacks against purely women's rights, in some countries, nationalist populists have advocated constitutional amendments aimed at an exclusively heterosexual definition of marriage in order to prevent same-sex couples from marrying.[66]

42. Minority women have been especially vulnerable to right-wing ethno-nationalist populism. For example, in much of the political debate across Western Europe, the veiled Muslim woman is deployed as the symbol of the "other" who does not belong.[67] The imagery of the veiled Muslim woman is also used to argue that misogyny is inherent in Islam. Countries that prohibit persons from wearing an Islamic veil in public effectively exclude many Muslim women from public spaces, and courts in some places have been swift to respond to this issue. For example, in the summer of 2016, about 30 municipalities, located mainly in southern France, issued decrees prohibiting the wearing of the Islamic swimsuit on the basis that it constituted a religious sign, in breach of the principle of secularism, and did not conform to hygiene and safety rules for those bathing in the sea.[68] The highest administrative court of France ordered the suspension of the execution of those municipal decrees, on the basis that they constituted an unjustified, serious breach of the fundamental rights to freedom of movement, personal freedom and freedom of conscience.

43. In other parts of the world, nationalist populist mobilizations have limited the access of minority women to sexual and reproductive health through administrative and financial barriers. Some countries have more explicitly discriminatory policies in place. For many years, the Government of Myanmar subjected Rohingya women to a strict two-child policy, and those found "to have violated restrictions on childbirth were prosecuted under Criminal Law section 188, which could result in imprisonment for up to 10 years, fines or both".[69] Fear of repercussions from authorities for unauthorized childbirth and the lack of access to safe, modern birth control options to prevent unwanted pregnancies had often led pregnant Rohingya women to either flee the country or resort to illegal and unsafe abortions.[70]

[64] Wodak, *The Politics of Fear*, pp. 13–14.

[65] Ibid, pp. 16–17.

[66] Human Rights House Zagreb submission.

[67] See Wodak, *The Politics of Fear*.

[68] OHCHR, "Press briefing notes on France and Bolivia", 30 August 2016.

[69] Human Rights Watch, "Submission to the Committee on the Elimination of Discrimination against Women regarding Myanmar's exceptional report on the situation of women and girls from northern Rakhine State", May 2018, p. 7.

[70] Ibid., p. 8.

C. The applicable legal framework

44. Insofar as nationalist populism advances ideologies of racial superiority and practices and structures of discriminatory exclusion and intolerance on grounds of race, colour and national or ethnic origin, it runs directly counter to international human rights law and principles. This section explains how racist and xenophobic expression contravenes existing international human rights obligations. It begins with an overview of States' legal obligation to combat the structural effects of nationalist populism, such as institutionalized discrimination and exclusion, and the shrinking of civic and democratic space, all of which should be seen as undermining racial equality.

Structural or institutionalized discrimination and exclusion

45. As discussed above, nationalist populist rule can lead to institutionalized legal and policy measures that violate the obligations of Member States to uphold the rights to non-discrimination and equality before the law for all. Article 1 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". The Special Rapporteur would like to recall that the prohibition on racial discrimination in international human rights law is aimed at much more than a formal vision of equality. Equality in the international human rights framework is substantive and requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat de facto or unintentional racial discrimination. The Committee on the Elimination of Racial Discrimination underscored that States have an obligation to dismantle discriminatory structures, in addition to tackling intentional discrimination.

46. This framework for substantive racial equality means that all measures that are aimed at voter suppression, or that undermine judicial independence, threaten the lives of human rights defenders and undermine press freedom, all in the service of advancing non-plural, mono-racial, mono-ethnic or mono-religious nations, must be addressed as a matter of urgency by Member States. These mechanisms, which directly and indirectly target and undermine the rights of marginalized racial, ethnic, national or religious groups, must be understood as contravening the prohibition of racial discrimination under international human rights law.

47. Noting in particular the dramatic increase in law and policy in right-wing nationalist populist contexts targeting the rights of non-nationals, the Special Rapporteur would like to recall the international legal framework applicable to non-nationals, as laid out in her most recent report to the Human Rights Council.[71] She reiterates that, while States have the sovereign right to regulate immigration, they must not do so in violation of their racial equality and non-discrimination obligations. In this regard, she also reiterates that laws and policies on immigration must not discriminate, in purpose or effect, on the basis of race, colour or national or ethnic origin. In particular, in the context of counter-terrorism, immigration and other measures must comply with the prohibition of racial discrimination, including with regard to racial and ethnic profiling or stereotyping.

48. It is equally important to recall that the rights outlined in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,

[71] See A/HRC/38/52, paras. 16–21.

including the freedoms of assembly, expression and association, apply to all persons everywhere. International human rights law requires States to respect, protect and fulfil the rights of defenders, including those fighting for racial equality and on behalf of migrants.[72] Moreover, the 1982 United Nations Convention on the Law of the Sea, in its article 98, establishes the duty (a) "to render assistance to any person found at sea in danger of being lost" and (b) "to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance". The same article stipulates that "every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose". The leading interpretation of this provision is that "the fact that the persons are engaged in an unlawful activity should not make any difference to the duty to rescue [and] the fact that the persons to be saved are migrants should not in any way hinder their right to be saved".[73]

49. The promotion of political and policy agendas aimed at reasserting "traditional values" to the detriment of the rights of women and some gender non-conforming persons is in contravention of international law. Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women requires States parties to implement appropriate measures to achieve the elimination of prejudices and customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Article 7 obliges States parties to take all appropriate measures to eliminate discrimination against women in political and public life, including in the formulation and implementation of government policy.[74] In its general recommendation No. 32 (2014), the Committee on the Elimination of Discrimination against Women clarified that the Convention necessarily applies to sex- and gender-based discrimination that disproportionately affects certain women because of their race, ethnicity, religion or belief, caste or other status.

Racist and xenophobic expression

50. Under international human rights law, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights impose strong limitations on the propagation of racist and xenophobic expression, and outlaw the advocacy of national, racial or religious prejudice that amounts to incitement to discrimination, hostility or violence. The Committee on the Elimination of Racial Discrimination, in its general recommendation No. 35 (2013), provided a useful explanation of how States parties should approach the regulation of racist speech under the Convention. The recommendation highlights a number of factors that should inform the practice of Member States. Significantly, the Committee recalls that racial equality and freedom of expression are symbiotic, and should not be pitted against each other in a competitive or zero-sum manner. Instead, "The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, and policy and practice as mutually supportive human rights."[75]

51. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires State parties to "condemn all propaganda and all

[72] See A/HRC/37/34.

[73] Irini Papanicolopulu, "The duty to rescue at sea, in peacetime and in war: a general overview", in "War and security at sea", *International Review of the Red Cross*, vol. 98, No. 2 (August 2016), p. 495.

[74] Committee on the Elimination of Discrimination against Women, general recommendation No. 23 (1997) on women in political and public life, para. 7.

[75] Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013) on combating racist hate speech, para. 45.

organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form". It also requires States parties to "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination" and to make punishable by law "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin". The Committee on the Elimination of Racial Discrimination has recommended concrete guidance for States parties on the adoption of legislation combating racist speech falling under article 4, and the Special Rapporteur encourages States to review general recommendation No. 35 in order to benefit from its concrete guidance.

52. Article 19 of the International Covenant on Civil and Political Rights protects freedom of opinion and expression, which may be restricted only in law and when such restrictions are necessary for respect of the rights or reputations of others and the protection of national security or of public order, or of public health or morals. Any restriction on freedom of speech must not only be a matter of necessity, but must be proportionately tailored to achieve the legitimate end that warrants the restriction.[76] Article 20 of the Covenant states specifically that States parties must legally prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The Human Rights Committee and a number of human rights mechanisms have interpreted this provision as creating a high threshold because the limitation of speech must remain exceptional.

53. Freedom of expression is also enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee on the Elimination of Racial Discrimination has reiterated that freedom of expression is integrated into the Convention, and that the Convention contributes to a fuller understanding of the parameters of freedom of expression under international human rights law. For determining what racist expression should be punishable by law, the Committee stresses the importance of context, which includes: (a) the content and form of the speech; (b) the economic, social and political climate; (c) the speaker's status and position; (d) the reach of the speech; and (e) the objectives of the speech. As discussed above, nationalist populism can have a profound impact on the national context in ways relevant to the assessment of whether offensive expression has crossed the threshold of discrimination established under the Convention. Nationalist populism shapes the climate of national discourse and can convert public political platforms into vehicles for spreading prejudice and intolerance and even inciting discrimination and violence. For this reason, Member States, and even private actors, such as the technology companies that often directly interface with racist and xenophobic content online, must remain vigilant in their identification of racist expression in national climates in which certain groups are openly committed to spreading and enforcing intolerance. The Committee warns that racist speech may sometimes rely on indirect language to disguise its targets or objectives, and may rely on coded symbolic communication to achieve its ends. Even "incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words".[77]

54. Member States must take urgent action to ensure that racist expression violating the standards set out in the International Convention on the Elimination of All Forms of Racial Discrimination are made punishable by law. In this regard, the Committee

[76] See CCPR/C/85/D/1022/2001.

[77] Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013) on combating racist hate speech, para. 16

on the Elimination of Racial Discrimination has recommended that the criminalization of racist expression be reserved for serious cases, to be proven beyond reasonable doubt and governed by principles of legality, proportionality and necessity,[78] and that less serious cases should be dealt with using non-criminal sanctions. The Convention requires States parties to declare illegal and prohibit racist organizations that promote and incite racial discrimination. This means that States parties must take action to prohibit racist organizations meeting the conditions articulated in article 4 (b), including in contexts in which such organizations use nationalist populist fervour to attempt to mainstream their extreme ideologies or racial, ethnic or religious hatred and intolerance. Under the Convention, legislation combating racist expression alone is not sufficient. Article 6 makes clear that effective protection from and remedies for racial discrimination are just as important as formal provisions.

55. Unfortunately, sometimes Member States use concerns about racist or intolerant speech as a pretext for illegitimately quashing expression that is compliant with human rights. In this regard, the Committee on the Elimination of Racial Discrimination has observed with concern that "broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention". The Special Rapporteur endorses the Committee's strong position that "measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition".[79] Overly broad defamation and slander laws that target minority religious groups, political opponents, academics, human rights defenders or others appropriately exercising their freedom of expression should not be tolerated. The Special Rapporteur also strongly condemns attempts by public and private actors to co-opt the language of equality and non-discrimination as a means of stifling legitimate expression. Similarly, the Special Rapporteur also condemns attempts by public and private actors to use the language of freedom of expression as a means of or cover for violating the rights of others to equality and non-discrimination.

56. The Committee on the Elimination of Racial Discrimination highlights that, although article 4 has operated as the principle vehicle for the prohibition of racist speech, the International Convention on the Elimination of All Forms of Racial Discrimination contains other provisions essential for fulfilling the objectives articulated in article 4. Article 4 expressly invokes article 5, which guarantees the right to equality before the law and the right to be free from racial discrimination in the enjoyment of rights, including freedom of expression. Article 6 requires effective remedies for violations of rights enshrined in the Convention, as indicated above, and article 7 underscores the importance of education in promoting equality and tolerance. Education that seeks to undercut the racist effects of nationalist populism should include accurate and representative accounts of national history that give voice to racial and ethnic diversity, and that expose the untruths of those who attempt to write minorities out of national histories and identities in order to sustain ethno-nationalist myths of racially or ethnically "pure" nations.

57. The Durban Declaration and Programme of Action condemns the persistence and resurgence of neo-Nazism, neo-Fascism and violent nationalist ideologies based on racial or national prejudice.[80] It also condemns political platforms and organizations based on doctrines of racial superiority and related discrimination, as well as legislation and practices based on racism, racial discrimination, xenophobia and related intolerance, highlighting that they are incompatible with democracy and

[78] Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, paras. 22–25 and 33–35.

[79] Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013) on combating racist hate speech, para. 20.

[80] See A/CONF.189/12 and A/CONF.189/12/Corr.1, chap. I, para. 84.

transparent and accountable governance. Furthermore, it reaffirms, in its paragraph 94, that the stigmatization of people of different origins by acts or omissions of public authorities, institutions, the media, political parties or national or local organizations is not only an act of racial discrimination but can also incite the recurrence of such acts, thereby resulting in the creation of a vicious circle which reinforces racist attitudes and prejudices, which must also be condemned.

58. The OHCHR Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence also suggests a high threshold for restrictions on freedom of expression.[81] It outlines a six-part threshold test in keeping with the approach of the Committee on the Elimination of Racial Discrimination, taking into account the following factors: context; speaker; intent; content and form; extent of the speech act; and likelihood, including imminence. The consultative process under the Plan is aimed at enhancing understanding of the relationship between freedom of expression and incitement to hatred. OHCHR has expressed concerns regarding how Member States often refrain from punishing perpetrators of incidents in violation of article 20 of the International Covenant on Civil and Political Rights and, at the same time, oversee de facto persecution through the abuse of vague domestic legislation, jurisprudence and policies on speech.[82] In the annual report to which the Plan is annexed, the United Nations High Commissioner for Human Rights found that anti-incitement laws in countries worldwide were at times excessively narrow or vague. The Plan recommends that domestic legal frameworks on incitement to hatred expressly refer to article 20 (2) of the Covenant and include robust definitions[83] of key terms such as "hatred", "discrimination", "violence" and "hostility" as defined in the Camden Principles on Freedom of Expression and Equality.[84]

59. The Special Rapporteur would like to note that criminalizing racist expression on its own could never fully address or remedy the persistence and perniciousness of racist expression. Consider the example of Europe, which, as a region, has commendably taken the most action to create an anti-hate-crimes regulatory framework. However, a recent report by the European Commission on the transposition and implementation of Council Framework Decision 2008/913/JHA, providing criminal law protection against hate speech and hate crimes, notes that the domestic adoption of the provisions contained in the Decision is often incomplete and/or incorrect.[85] The report highlights that factors hindering the implementation of the Decision include practitioners' insufficient knowledge of the relevant legislation. The European Network against Racism also noted that existing mechanisms within the institutions of the European Union fail to effectively monitor and sanction hate speech. As a result, the Special Rapporteur urges Member States to focus on adopting the necessary frameworks and ensuring their proper enforcement.

[81] See A/HRC/22/17/Add.4. For details and documentation of the consultation process regarding the Rabat Plan of Action, see www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx.

[82] See A/HRC/22/17/Add.4, para. 11.

[83] See A/67/357, paras. 44–46.

[84] Article 19, International Centre against Censorship, "Camden Principles on Freedom of Expression and Equality", 30 April 2009. Available at https://www.article19.org/resources/camden-principles-freedom-expression-equality/. See also, E/CN.4/1996/39, annex; and A/67/357, paras. 39–45.

[85] European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, *The European Legal Framework on Hate Speech, Blasphemy and Its Interaction with Freedom of Expression* (Brussels, European Union, 2015).

III. Conclusions and recommendations

60. **The first recommendation of the Special Rapporteur is that Member States actively and explicitly recognize that nationalist populist mobilizations threaten racial equality. Too often, public officials are reluctant to acknowledge the prevalence of racism, discrimination and related intolerance, and this state of denial itself can prevent action to combat discrimination and intolerance. Condemnation of racist and xenophobic nationalist populism must be swift and unequivocal. Political parties and their leadership also have a role to play here, given their significant influence on the political climate, as do multilateral agencies and regional bodies. The bold stand against racism and xenophobia taken by the outgoing United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, is emblematic of the action required. Acknowledging the nationalist populist threat to racial equality also means rejecting national narratives that erase racial, ethnic and religious minorities from national history and identity. All United Nations Member States and United Nations senior officials, including the Secretary-General, should follow the lead of the High Commissioner in taking a bold stance against racism and xenophobic hatred, including when this hatred and intolerance is falsely cloaked in concerns for national prosperity.**

61. **Where nationalist populist threatens racial equality, Member States are obliged to take action to combat this threat, in order to comply with their equality and non-discrimination obligations under international human rights law. This means taking all measures necessary to combat direct and indirect forms of racial discrimination, at all levels of government: national, provincial and even local. Local authorities play an especially vital role in the enforcement of human rights. In this regard, the Special Rapporteur would like to acknowledge local government authorities such as Domenico Lucano,[86] Mayor of Riace, Italy, who welcomed refugees who have gone on to give new life to their host communities. She would also like to acknowledge the civil society organizations and private individuals around the world who are fighting back against exclusionary populist nationalism, and to acknowledge the Afrodescendent, indigenous and other minority human rights defenders who risk their lives daily to hold their Governments to account for racial inequality.**

62. **Those combating racial and xenophobic discrimination and exclusion should carefully account for intersectionality, and how gender, disability status, sexual orientation and other social categories shape the experience of discrimination. Member States should actively reject the reinforcement of patriarchy and heteronormativity through laws that, in the name of national or traditional values, undercut the autonomy of women, and gender and sexual minorities. They should also take seriously the fact that an intersectional approach to fighting discrimination means including women, persons with disabilities, gender and sexual minorities and others in decision-making at all levels of government.**

63. **With respect to expression in particular, Member States should implement the concrete recommendations that other United Nations bodies, especially the Committee on the Elimination of Racial Discrimination, have made that pertain to combating racist and xenophobic expression. General recommendation No. 35 is vital in this regard, and, owing to space constraints, its practical guidance is not recapitulated here, but instead incorporated by reference. In keeping with the Committee's guidance, the Special Rapporteur urges States parties to**

[86] See Thomas Bruckner, "Refugees revive fading Italian villages", *Al-Jazeera*, 2 May 2016.

withdraw their reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 20 of the International Covenant on Civil and Political Rights. She also reiterates that "as a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively" (see CERD/C/GC/35, para. 9). The Special Rapporteur reiterates her strong condemnation of attempts by public and private actors to co-opt the language of equality and non-discrimination as a means of stifling legitimate expression, and attempts to use the language of freedom of expression as a means of or cover for violating the rights of others to equality and non-discrimination.

64. **Legal sanctions are only one part of a comprehensive strategy. Member States, civil society and even private individuals should also take positive measures to counter climates of intolerance. An example of the available resources on using positive measures to combat racist expression can be found in a 2018 report by Article 19, International Centre against Censorship.[87] Another example is the action taken by the European Union high-level group on combating racism, xenophobia and other forms of intolerance to adopt a code of conduct with Facebook, Microsoft, Twitter and YouTube on illegal online hate speech in May 2016.[88] In 2018, Google+, Instagram and Dailymotion announced their participation in the code of conduct.[89]**

65. **The media also have an important role to play in tackling racist and xenophobic expression, and should observe codes of conduct that embody a substantive commitment to racial equality, which, as discussed above, is symbiotic with legitimate freedom of expression. The Special Rapporteur commends initiatives such as the Ethical Journalism Network, an alliance of reporters, editors and publishers aimed at promoting ethical journalism around five core principles: truth and accuracy, independence, fairness and impartiality, humanity and accountability. It proposes training, education and research to promote fact-based communications to help people truly understand the world around them.[90] Similarly, she welcomes the development of initiatives such as Media against Hate, a Europe-wide campaign initiated by civil society organizations and the European Federation of Journalists.[91]**

[87] Article 19, International Centre against Censorship, "Responding to 'hate speech': comparative overview of six EU countries", 2 March 2018.

[88] See http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.

[89] European Commission, "Countering illegal hate speech online #NoPlace4Hate", 11 July 2018.

[90] Ethical Journalism Network, "The 5 principles of ethical journalism", available at https://ethicaljournalismnetwork.org/who-we-are/5-principles-of-journalism.

[91] Article 19, International Centre against Censorship, "Self-regulation and 'hate speech' on social media platforms", 2 March 2018.